

THE STATE OF NEW HAMPSHIRE

SUPREME COURT

In Case No. 2007-0090, In the Matter of Henry Flickinger and Tracy Flickinger, the court on March 18, 2008, issued the following order:

The petitioner, Henry Flickinger, appeals and the respondent, Tracy Flickinger, cross-appeals the trial court's order denying the petitioner's motion to modify the parties' property division, granting his motion to modify child support, and denying his request for attorney's fees and costs. We affirm.

I. Petitioner's Appeal

The petitioner first argues that the trial court erred when it failed to modify the parties' property division despite having found that the respondent engaged in fraud by failing to disclose her 2004 income. "A property settlement in a divorce decree is a final distribution of a sum of money or a specific portion of the spouses' property and is not subject to judicial modification on account of changed circumstances." In the Matter of Birmingham & Birmingham, 154 N.H. 51, 57 (2006) (quotation omitted). "Such a property distribution will not be modified unless the complaining party shows that the distribution is invalid due to fraud, undue influence, deceit, misrepresentation, or mutual mistake." *Id.* (quotation and brackets omitted). We review the trial court's decision on a motion to modify a property settlement under our unsustainable exercise of discretion standard. See *id.*

Although the law permits a trial court to modify a property division upon proof of fraud, undue influence, deceit, misrepresentation, or mutual mistake, it does not mandate such modification. In the instant case, the trial court reasonably could have found that its property division remained equitable, notwithstanding the respondent's fraud. In the original divorce decree, the trial court awarded the respondent her respective checking and savings accounts "free and clear of any right, title or interest" of the petitioner. At the time of the final hearing on the divorce, the respondent's financial affidavit revealed that she had approximately \$35,000 in cash assets that she did not previously have. At the final hearing, the respondent testified that this money represented "advances for work that [she was] either doing or about to do." While this statement was false in that the \$35,000, in fact, was payment the respondent received in January 2004 for work she performed in the last quarter of 2003, the trial court reasonably could have determined that the source of the money was immaterial to its property division. Because the trial court reasonably could have found that its property division remained equitable, despite the respondent's fraud, we

conclude that it did not unsustainably exercise its discretion by declining to modify the parties' property settlement.

The petitioner next asserts that the trial court erred when it failed to find that the respondent committed fraud with respect to the value of her business and her copyrights. On appeal, we will affirm the findings and rulings of the trial court unless they are unsupported by the evidence or legally erroneous. In the Matter of Giacomini & Giacomini, 150 N.H. 498, 500 (2004).

To establish fraud, a plaintiff must prove that the defendant made a representation with knowledge of its falsity or with conscious indifference to its truth with the intention to cause another to rely upon it. Snierston v. Scruton, 145 N.H. 73, 77 (2000). In addition, a plaintiff must demonstrate justifiable reliance. *Id.* Further, "fraud may consist in the intentional concealment of a material fact." LeClerc v. Insurance Company, 93 N.H. 234, 237 (1944) (quotation omitted). The trial court rejected the petitioner's fraud claims on these two items because it found that his reliance upon the respondent's material misrepresentations was not reasonable. As the record supports this finding, we uphold it. Therefore, we conclude that the trial court did not err when it found no fraud with respect to the respondent's valuation of her business or copyrights.

The petitioner next contends that the trial court erred when it denied his request for attorney's fees. "An award of attorney's fees must be grounded upon statutory authorization, a court rule, an agreement between the parties, or an established exception to the rule that each party is responsible for paying his or her own counsel fees." In the Matter of Hampers & Hampers, 154 N.H. 275, 289 (2006) (quotation omitted). We review the trial court's denial of a request for attorney's fees under our unsustainable exercise of discretion standard. *See id.* at 290.

The petitioner claims that he was entitled to an attorney's fee award because he was forced to seek judicial assistance to secure his clearly defined right "either to pay or receive child support consistent with both parties submitting verified financial information to the lower court at the time of the final contested divorce hearing." See Blouin v. Sanborn, 155 N.H. 704, 708 (2007). After reviewing the record, we find that the trial court sustainably exercised its discretion by denying the petitioner's request for attorney's fees. Here, as in Blouin, numerous factual and legal issues were legitimately in contest, including whether the respondent, in fact, engaged in fraud. *Id.* Under these circumstances, we cannot conclude that the trial court's decision to deny the petitioner's request for attorney's fees was an unsustainable exercise of discretion.

II. Respondent's Cross-Appeal

In her cross-appeal, the respondent first asserts that the trial court erred when it found that she committed fraud with respect to her 2004 income. The respondent had a mandatory duty to disclose her present income. See Super. Ct. R. 197; In the Matter of Rohdenburg & Rohdenburg, 149 N.H. 276, 278 (2003). Despite this legal duty, the record supports a finding that she failed to disclose as income money that she received in January 2004 for work performed in the last quarter of 2003 and money that she expected to receive a week after the final hearing for work she performed in the first quarter of 2004. There is also evidence to support a finding that the respondent failed to disclose this income with the intent to cause the petitioner to rely upon her 2003 tax return as indicative of the income she expected to earn in 2004. Moreover, there is evidence to support a finding that the petitioner's reliance upon the respondent's statements regarding her 2004 income was justified. Accordingly, we find no error in the trial court's determination that the respondent engaged in fraud with respect to her 2004 income.

The respondent next argues that the trial court erred in finding that the petitioner had custody of the children 60% of the time because this fact was not pleaded and because she failed to contest it at trial. Having reviewed the record, we conclude that the trial court's finding on this matter is not erroneous. The petitioner's testimony, to which the respondent did not object, supports the finding. Further, contrary to her assertions, the respondent's testimony contested the petitioner's contention that he had custody of the children 60% of the time.

Affirmed.

DUGGAN, GALWAY and HICKS, JJ., concurred.

**Eileen Fox,
Clerk**